Supreme Court, U.S.
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99-412

In The

Supreme Court of the United States

LOUISVILLE COUNTRY CLUB; IDLE HOUR COUNTRY CLUB; PENDENNIS CLUB, INC.,

Petitioners,

v.

BEVERLY L. WATTS; PRISCILLA JOHNSON; ROBERT B. BOWLING; THURMOND COLEMAN, SR.; LOUISE M. COOPER; SUE G. DOWDY; HENRY L. JACKSON; JENNIFER JOLLY-RYAN; KAREN V. MCCORD; JOSEPH MCMILLAN; SUSAN D. PHILLIPS; and MARY ANN STEWART,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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I. STATEMENT OF THE FACTS

This dispute between the Petitioners (hereinafter referred to as "the clubs") and the Respondents (hereinafter referred to collectively as "the Commission") arises entirely from controversial statutory enactments of the Kentucky state legislature: KRS §§ 141.010(11)(d) and (13)(f). Petitioners' Appendix R. These two sections of the Kentucky Revenue Code were enacted in their current form during the 1990 session of the Kentucky General Assembly. Put simply, these revenue code sections prohibit taxpayers from deducting any amounts paid to private clubs which have been found to discriminate on the basis of race, color, religion, national origin, or sex.[1]

Because these revenue code provisions are the genesis for the entire controversy between the clubs and the Commission, they should be scrutinized at the outset of this discussion. As addressed in greater detail below, the Commonwealth of Kentucky has a compelling state interest in eliminating invidious forms discrimination by private clubs. But the General Assembly of Kentucky has not directly prohibited private club discrimination. Instead, the General Assembly merely acted to abolish a state

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[1] The clubs have previously asserted that changes in tax laws rendered these revenue code provisions moot. While deductions for club dues are no longer allowed under Kentucky's tax code, a variety of other payments to clubs remain deductible, thus preserving a live controversy in this case. 26 U.S.C. § 274(2)(k) (deductions for meals); 26 U.S.C. § 274(a) (deductions for entertainment, amusement, or recreation); 26 U.S.C. § 274(a)(2)(C) (deductions for use of club facilities). The foregoing federal statutes are applied in Kentucky by KRS §§ 141.010(11) & (13).

benefit, a tax deduction, which had the effect of subsidizing and perpetuating invidious discrimination.

Like California and Colorado, the Commonwealth of Kentucky amended its revenue code to abolish any indirect state tax subsidies that benefit discriminatory clubs.[2] Pursuant to the challenged revenue code provisions, Kentucky taxpayers are now prohibited from taking "[a]ny deduction for amounts paid to any club, organization, or establishment which has been determined by the courts *or an agency established by the General Assembly and charged with enforcing the civil rights laws of the Commonwealth,* not to afford full and equal membership and full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations to any person because of race, color, religion, national origin, or sex." KRS §§ 141.010(11)(d) and (13)(f) (emphasis added). But this enactment necessarily relies upon a determination that a particular club has discriminatory practices. The statute clearly refers to the Kentucky Commission on Human Rights where it indicates that such a determination may be made by the agency charged with enforcing the civil rights laws of the Commonwealth. KRS Chapter 344.

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[2] *See,* Cal. Rev. & Tax. Code § 17269 (West 1997) (denying personal income tax deduction); Cal. Rev. & Tax. Code § 24343.2 (West 1997) (denying corporate income tax deduction); Colo. Rev. Stat. § 39-22-104(1)(e)(I) (1997) (denying personal income tax deduction; Colo. Rev. Stat. § 39-22-304(e)(I) (1997) (denying corporate income tax deduction). *See also, Pacific-Union Club v. Superior Court,* 232 Cal.App.3d 60, 283 Cal.Rptr. 287, 293 (Cal.App. 1 Dist. 1991) (examining in detail California anti-discrimination provisions analogous to KRS §§ 141.010(11)(d) & (13)(f)).

Much of the dispute regarding the foregoing provision arises from the fact that the public accommodation provisions of the Kentucky Civil Rights Act do not vest the Commission with the authority to conduct an investigation of *bona fide* private clubs. KRS § 344.130(1) ("A private club is not a place of public accommodation, resort, or amusement if its policies are determined by its members and its facilities and services are available only to its members and their bona fide guests; . . . "). Based upon this longstanding limitation upon the scope of its jurisdiction, the Commission initially concluded that it lacked statutory authority to make the investigation and determination envisioned by the revenue code provisions. *Coleman v. Louisville Country Club, et al.*, RA 110, RA 248, RA 398.[3] But the Commission subsequently reversed its position on this issue, in view of an Attorney General Opinion discussed below.

On October 9, 1991, the legislative sponsor of the relevant Revenue Code amendments, State Representative Ann Northup, requested an opinion of the Kentucky Attorney General regarding the scope of the Commission's authority under the revenue code provisions. The request and the Attorney General's Opinion (OAG 91-197) are attached as Appendix A. The Attorney General applied well known canons of statutory construction and concluded that Revenue Code amendments vest the Commission with independent authority to investigate

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[3] Citations to "RA" are to pages of the "record on appeal" (Joint Appendix) filed with the U.S. Court of Appeals for the Sixth Circuit on March 4, 1998.

private clubs for the limited purpose of preventing improper tax deductions.

Subsequent to the issuance of the Attorney General's Opinion, the Commission initiated a second administrative proceeding against each of the clubs and issued discovery requests relevant to the clubs' membership practices. *Cleveland v. Louisville Country Club, et al.*, Petitioners' Appendix X. The clubs responded with a motion to dismiss. They asserted that the Commission was bound by its prior determination that it lacked jurisdiction to proceed against the clubs. They also asserted that the revenue code amendments did not enlarge the Commission's jurisdiction to investigate clubs. RA 116, 252, 557.

Relying on the Attorney General's Opinion, and their own reading of the statutes at issue, the Commissioners denied the clubs' motion to dismiss. Petitioners' Appendix E. The Commission subsequently renewed its original discovery demands and sought membership information from the clubs. Petitioners' Appendix X and Y. Shortly thereafter, the clubs filed suit against the Commission in the United States District Court for the Eastern District of Kentucky.

II. STATEMENT OF THE CASE

The clubs' suit seeks redress for the alleged violation of their members' federal rights of free association under the First and Fourteenth Amendments to the Constitution of the United States. 42 U.S.C. § 1983. The clubs also argue that the Commission exceeded its statutory authority by investigating complaints against them. Based upon

the foregoing claims, the clubs seek declaratory and injunctive relief to block the Commission from continuing with its investigation and administrative proceeding. The clubs also seek an award of attorney fees under 42 U.S.C. § 1988. Notably, no plea for monetary damages has been made by the clubs.

After the federal suit was filed, the Commission agreed to forego further investigation and proceedings in the administrative action, but only until the District Court issued a final decision, and not during the pendency of appeal. On August 25, 1999, the District Court issued a final order dismissing the underlying proceeding without prejudice in accordance with the decision of the Sixth Circuit Court of Appeals. The Commission has now resumed its investigation.[4]

On August 21, 1995, the Commission filed a motion to dismiss the clubs' complaints as barred by the Tax Injunction Act, or to abstain under the *Pullman* abstention doctrine. *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 499-501 (1941). As an alternative to *Pullman* abstention, the Commission also moved the District Court to certify the novel statutory construction issue to the Supreme Court of Kentucky, as specifically authorized by Kentucky Civil Rule of Procedure 76.37. RA 612-622. The requests for *Pullman* abstention and certification were premised upon the contention that a resolution of the state statutory construction issue could avoid the more

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[4] On August 30, 1999, the Commission withdrew its outstanding request for membership lists, and instead requested that the clubs provide statistical information regarding club membership. Appendix B.

complex constitutional claims raised by the clubs. *See, Arizonans for Official English v. Arizona*, 520 U.S. 43, 78-80 (1997); *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 499-501 (1941).

On February 6, 1996, the District Court declined to dismiss the complaint pursuant to the Tax Injunction Act, declined to abstain, and declined to certify the statutory construction issue to the Supreme Court of Kentucky. Petitioners' Appendix D. The District Court held: "[a] determination of whether the Commission has authority to investigate private clubs will not necessarily obviate the consideration of whether the actions taken by the defendants thus far are unconstitutional." Petitioners' Appendix D, p. 26a. Ironically, the District Court later contradicted this conclusion when it subsequently disposed of the case through an analysis of Kentucky statutes. Petitioners' Appendix C, pp. 13a-15a. The District Court found that the Tax Injunction Act precluded at least some of the clubs' claims, and it sustained the motion to dismiss the Commission itself, pursuant to the agency's Eleventh Amendment immunity from suit. Petitioners' Appendix D, pp. 18a-22a.

Subsequent to the denial of the motion to dismiss, the parties held a planning meeting as required by Fed. R. Civ. P. 26(f). AR 737-738. During the meeting, the parties agreed that resolution of the substantive constitutional claims would necessitate collateral litigation regarding the scope of relevant discovery. Report of Parties' Planning Meeting attached as Appendix C. For example, the Commission has long asserted that a resolution of the constitutional issues raised herein will require discovery as to the amount of business conducted by members and

nonmembers at the three clubs. *See, Pacific-Union Club v. Superior Court*, 232 Cal.App.3d 60, 283 Cal.Rptr. 287, 293 (Cal.App. 1 Dist. 1991) (discussing relevance of this factual issue to resolving First Amendment freedom of association claims in a case examining California anti-discrimination provisions analogous to KRS §§ 141.010(11)(d) & (13)(f)). *See also, Louisiana Debating and Literary Association v. City of New Orleans*, 42 F.3d 1483, 1494-1497 (5th Cir. 1995).

Because the clubs sought to avoid a discovery dispute, they proposed a stay of discovery and the filing of initial dispositive pleadings on the statutory construction issue. Statutory construction was exactly what the Commissioners had in mind when they sought certification of a question of law to the Kentucky Supreme Court pursuant to Ky. R. Civ. P. 76.37. RA 612. In the hope that a liberal construction of the revenue code provisions would strengthen the Commission's defense of the clubs' constitutional claims, and given the fact that the District Court had refused to defer this issue to the state courts, the Commission agreed to stay discovery pending a resolution of the narrow statutory construction question. *See*, Report of Parties' Planning Meeting at Appendix C. Through this mechanism, the parties agreed to postpone discovery and adjudication regarding the clubs' constitutional claims. The parties filed their joint motion to stay discovery on the same date as the report of the planning meeting. AR 668.

The Commission was surprised when the clubs filed a motion for summary judgment premised in part upon their constitutional claims. The Commission responded

by asserting that summary judgment on the constitutional claims would be premature, as no discovery had yet been taken regarding facts relevant to those claims.[5] AR 738-742.

The clubs appear to argue, because they are exempt from the Kentucky Civil Rights Act, they are automatically entitled to absolute protection from government inquiry under the relevant revenue code provisions.[6] But

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[5] "Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984). *See also, Pacific-Union Club v. Superior Court*, 232 Cal.App.3d 60, 283 Cal.Rptr. 287, 293-298 (Cal.App. 1 Dist. 1991) (discussing facts relevant to resolving First Amendment freedom of association claims in a case involving tax provisions analogous to KRS §§ 141.010(11)(d) & (13)(f)); *Louisiana Debating and Literary Association v. City of New Orleans*, 42 F.3d 1483, 1494-1497 (5th Cir. 1995).

[6] Citing the Commission decision of March 15, 1995, the clubs contend that the Commission found them to be exempt from public accommodations laws pursuant to the statutory exemption. KRS § 344.130(1) ("A private club is not a place of public accommodation, resort, or amusement if its policies are determined by its members and its facilities and services are available only to its members and their *bona fide* guests.") But a thorough reading of this decision indicates that the Commission believed this to be an open question. The final sentence of the decision directs that: "Initially, discovery should be pursued in regard to whether the [clubs] are indeed "private clubs" and entitled to any exception." Petitioners' Appendix E, pp. 34a-35a. Discovery on this issue was cut short by the clubs' federal suit; however, if permitted, the Commission believes discovery will establish that at least one of the clubs has routinely and

in order to make a reasoned constitutional analysis regarding the privacy rights of club members, a court must first determine where the clubs rest in the "broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984). This determination must rest largely upon a number of factual findings which are not addressed in the record: "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.* In light of these factors, it is quite possible that the protection extended to each club is different, depending upon the relevant facts.[7]

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repeatedly opened its doors to individuals who are neither members nor *bona fide* guests.

[7] In *Pacific-Union Club v. Superior Court*, 232 Cal.App.3d 60, 283 Cal.Rptr. 287, 297 (Cal.App. 1 Dist. 1991), the California Franchise Tax Board subpoenaed the Pacific-Union Club's membership list in order to ascertain whether the new tax codes restricted the use of business expense deductions by club members. The California court specifically considered the fact that the club did not include among their activities business development and community interaction. The court also considered the extent to which the club enforced rules intended to maintain privacy: "The doors do not open from the outside; members and guests must identify themselves and be admitted by security staff. No member may bring the same person as a guest more than four times a month." *Pacific-Union Club*, 283 Cal. Rptr. at 295. Also relevant is the fact that the Pacific-Union Club purported to be, and was found to be, a purely private social organization. This fact was crucial to the California court's analysis: "Club members are prohibited from conducting business on Club premises. Club members must certify that charges incurred for use of Club facilities, including meals, were not incurred in the furtherance of trade, business or

The deliberate absence of any discovery on these issues greatly undermines the clubs' reliance upon constitutional claims.

It is clear that any resolution of the clubs constitutional claims would be premature, and on May 13, 1997, the District Court granted the clubs' motion for summary judgment without addressing the constitutional claims. Petitioners' Appendix B and C. The District Court focused upon the statutory construction issue, and held the statutes at issue do not grant the Commission express or implied authority to investigate private clubs.

The Commission appealed, asserting that the District Court erred both in failing to abstain or certify, and in its construction of relevant Kentucky statutes. The Petitioners filed a cross-appeal, asserting that the District Court erred in its partial application of the Tax Injunction Act, 28 U.S.C. § 1341. The Sixth Circuit Court of Appeals found it unnecessary to address any of the issues raised by the parties on appeal, and instead concluded that the District Court should have abstained pursuant to the *Younger* abstention doctrine. The clubs now ask this Court to grant certiorari in order to consider whether *sua sponte*

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a profession. . . . Since April 1, 1988, each monthly statement has included this instruction: 'DUES ARE NOT DEDUCTIBLE AS CHARITABLE CONTRIBUTIONS. DUES & OTHER EXPENDITURES ARE NOT DEDUCTIBLE AS ORDINARY & NECESSARY BUSINESS EXPENSES FOR FEDERAL & CALIFORNIA STATE INCOME TAX OR FRANCHISE TAX PURPOSES.' " *Id. See also, Louisiana Debating and Literary Association v. City of New Orleans*, 42 F.3d 1483, 1494-1497 (5th Cir. 1995).

application of the *Younger* abstention doctrine was proper.

III. REASONS FOR DENYING THE WRIT

The clubs have correctly identified the legal issues relevant to the application of the *Younger* abstention doctrine. *See, Middlesex County Ethics Commission v. Garden State Bar Assoc.*, 457 U.S. 423, 432 (1982) (Where vital state interests are involved, a federal court should abstain from interfering in an ongoing state administrative proceeding, "unless state law clearly bars the interposition of the constitutional claims."). But it should be noted that the *Younger* abstention doctrine is particularly applicable in this case, where the District Court's only role was to adjudicate a broad facial attack on a novel state statute. This is the type of federal interference warned against in *Moore v. Sims*, 442 U.S. 415, 429-430 (1979).

> State courts are the principal expositors of state law. Almost every constitutional challenge – and particularly one as far ranging as that involved in this case – offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests. When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals. The price exacted in terms of comity would only be outweighed if state courts were not competent to adjudicate federal constitutional claims – a postulate we have repeatedly and emphatically rejected.

Id. (citations omitted).

As in *Middlesex County Ethics Commission*, the question in this case is threefold: first, do the state administrative proceedings constitute an ongoing quasi-judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges. *Middlesex County Ethics Commission v. Garden State Bar Assoc.*, 457 U.S. 423, 432 (1982).

A. State Quasi-Judicial Proceedings Are Ongoing.

There can be no dispute that state administrative proceedings are ongoing. The dual purposes of the ongoing administrative proceeding are: (1) to ascertain whether the clubs "afford full and equal membership and full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations to any person because of race, color, religion, national origin, or sex" in accordance with the Commission interpretation of the 1990 revenue code amendments (KRS §§ 141.010(11)(d) and (13)(f)); and (2) to ascertain whether the clubs' "policies are determined by members and [the clubs'] facilities and services are available only to members and their *bona fide* guests" in accordance with KRS § 344.130(1), the private clubs exemption from Kentucky public accommodation laws. *See*, Petitioners' Appendix E, pp. 34a-35a.

The clubs' contention that there is no ongoing state proceeding is in stark contrast with their vigorous defense within the administrative forum. As recently as October 5, 1999, the clubs filed an objection to the Commission's recent request for statistical information regarding club membership. Appendix D. Nor is there merit to

the clubs' unsupported claim that the initial determination by the Commission precludes subsequent litigation pursuant to the revenue code provisions or the public accommodations laws. The doctrines of *res judicata*,[8] collateral estoppel,[9] and *stare decisis*[10] do not bar reconsideration of these important legal issues. In any event, the legitimacy of these defenses could and should be resolved within the administrative proceeding or by state courts.

The clubs also contend that the ongoing administrative proceeding does not satisfy the first prong of *Middlesex County Ethics Commission* because the Commission's final determination will only be enforceable by the Kentucky Revenue Cabinet. This contention is without

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[8] *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998). For claim preclusion to bar further litigation, certain elements must be present. First, there must be identity of the parties. *Newman v. Newman*, 451 S.W.2d 417, 419 (Ky. 1970). The initial administrative proceedings relevant to the clubs were filed by Louis Coleman. AR 121, 257, 406. But the administrative proceedings currently challenged were filed by Mae Cleveland. *Id.*

[9] Where important public interests are involved, collateral estoppel will not bar relitigation of a legal issue. *Western Oil & Gas v. U.S. E.P.A.*, 633 F.2d 803, 809 (9th Cir. 1980); *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 299-300 (7th Cir. 1979); Restatement (Second) of Judgments § 28(2)(b), (3), and (5)(a). *See also, Ward v. Southern Bell Tel. & Tel. Co.*, 436 S.W.2d 794, 796-97 (Ky. 1968) (It would be inequitable to "allow the act of one government attorney, in failing to appeal, to forever bind the state.").

[10] *Revenue Cabinet, Com. of Ky. v. Samani*, 757 S.W.2d 199, 202 (Ky. App. 1988).

basis. A final determination in the ongoing state administrative proceeding will be equivalent to a declaratory judgment adjudicating the legal status of the clubs and the rights of each club's members. Given the fact that the Commission has begun an investigation, held a preliminary hearing, received evidence, and kept an official record, the pending administrative proceeding is clearly a state prosecution sufficient to satisfy the first prong of *Middlesex County Ethics Commission*.

B. The State Proceedings Implicate Important State Interests.

This Court has long recognized the compelling state interest in eliminating discrimination. *Rotary Club v. Duarte*, 481 U.S. 537, 549 (1987); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). Clearly, the state legislature has determined that it is contrary to the public policy of the Commonwealth of Kentucky to extend a tax benefit to individuals who join private clubs which discriminate on the basis of "race, color, religion, national origin, or sex." KRS 141.010(11)(d) and (13)(f).

In the decision denying the clubs' motion to dismiss, the Commission specifically provided that discriminatory membership practices of private clubs "literally relegate women and minorities to side doors and back rooms, perpetuating their treatment as second class citizens that bears no relation to their actual abilities." Petitioners' Appendix E, p. 30a (*citing*, Parker, *Membership Has Its Privileges*, 8 Cal. Law (June 1988)). To the extent that the revenue code provisions intrude upon the associational privacy rights of the clubs, that intrusion is warranted by

a compelling state interest. *Rotary Club v. Duarte*, 481 U.S. 537, 549 (1987). In *Buckley*, this Court stated that where a compelling state interest exists, a "significant interference with protected rights" may be warranted. *Buckley*, 424 U.S. at 25.

In addressing the second prong of *Middlesex County Ethics Commission*, the clubs initially contend that a finding of discrimination under KRS 141.010(11)(d) or (13)(f) will not necessarily bind the Kentucky Revenue Cabinet in its decision whether to bar deductions taken for payments to discriminatory clubs. A simple reading of the revenue code provisions defeats this claim. *See*, Petitioners' Appendix R. Payments to discriminatory clubs are specifically exempted from those items characterized as valid deductions. Under the statutory scheme enacted by the General Assembly, there is no discretion through which the Kentucky Revenue Cabinet could choose to ignore or disregard a Commission finding of discrimination made pursuant to KRS 141.010(11)(d) or (13)(f).

The clubs also suggest that nothing important can come from the agency proceeding because the Commission is barred from prosecuting the clubs. This line of argument defeats the whole purpose of *Younger* analysis because it assumes that this Court is willing to construe the Kentucky statutes in a manner opposite to that of the Commission and Kentucky's Attorney General. As stated previously, the Commission concluded that further investigation is needed in order to determine whether the clubs are exempt from the public accommodation provisions of the Kentucky Civil Rights Act. *See*, Petitioners' Appendix E, pp. 34a-35a. And even if the clubs are eventually found to be exempt from public accommodation

laws, the Commission has found that the clubs are nonetheless subject to Commission prosecution in accordance with the 1990 amendments to the Kentucky Revenue Code. At issue is whether the pending administrative proceeding implicates important state interests. The suggestion that the Commission lacks statutory authority to proceed with the administrative proceeding is simply an end run around the question.

C. There Is An Adequate Opportunity to Raise Constitutional Challenges in the State Proceedings.

A central part of the *Younger* abstention doctrine is a frank recognition that state courts, as judicial institutions of co-extant sovereigns, are equally capable of safeguarding federal constitutional rights. *See, Trainor v. Hernandez,* 431 U.S. 434, 446 (1977). Kentucky courts continue to show no reluctance to remedy constitutional violations where found. *See, e.g., St. Ledger v. Commonwealth,* 912 S.W.2d 34, 38-39 (Ky. 1995) (striking down disparate taxation of in-state and out-of-state bank deposits under intangibles tax scheme as violative of the commerce clause).

The clubs have several avenues for raising and preserving their claims in state court. The foremost of these remedies is a declaratory judgment action in state court. Under Kentucky law, a declaratory judgment action is clearly an appropriate vehicle for challenging the constitutionality of statute or the conduct of State officials. KRS §§ 418.040 et seq. Kentucky's Declaratory Judgment Act

permits statutory construction and constitutional challenges and does not preclude injunctive relief where warranted. *See, Harrodsburg v. Southern Ry.*, 128 S.W.2d 233, 235 (Ky. 1939).

The clubs assert that they must exhaust administrative remedies before seeking relief in state court. But where constitutional or jurisdictional challenges are brought, parties are not required to exhaust administrative remedies. *Rosary Catholic Parish of Paducah v. Whitfield*, 729 S.W.2d 27, 29 (Ky. App. 1987); *International Soc'y for Krishna Consciousness v. Commonwealth*, 610 S.W.2d 910, 912 (Ky. App. 1980); *Dolan v. Land*, 667 S.W.2d 684, 688 (Ky. 1984); *Barrett v. Reynolds*, 817 S.W.2d 439, 441 (Ky. 1991).

The clubs may also raise and preserve their constitutional claims within the administrative forum and on appeal.[11] The clubs may seek interlocutory review of agency actions through a petition for writ of mandamus. *Southeastern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 199-200 (Ky. 1997). The clubs may file a collateral state court constitutional challenge to the agency proceeding. *In re Gillis*, 836 F.2d 1001, 1011-1012 (6th Cir.

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[11] In 1996, the Kentucky General Assembly enacted KRS Chapter 13B, the Kentucky Administrative Procedures Act. By the express terms of the General Assembly, the underlying administrative proceedings must be conducted in accordance with KRS Chapter 13B. KRS § 13B.020. This Chapter guarantees all aggrieved parties a right to appeal any final agency order. KRS § 13B.140. Courts reviewing agency decisions review *de novo* all legal issues, including allegations regarding the violation of constitutional or statutory provisions. KRS § 13B.150(2)(a).

1988) (Failure to exhaust administrative remedies does not foreclose a state court First Amendment challenge.); *Rosary Catholic Parish of Paducah v. Whitfield*, 729 S.W.2d 27, 29 (Ky. App. 1987) (exhaustion of administrative remedies is not required where the aggrieved party calls into question either constitutionality of statute or ordinance involved or jurisdiction of governmental entity to proceed). Alternatively, the clubs may file a collateral state court challenge regarding the agency's construction of the relevant revenue code provisions. *Franklin v. Natural Resources and Environmental Protection Cabinet, Com. of Ky.*, 799 S.W.2d 1, 2 (Ky. 1990) (Direct judicial relief is available, without exhaustion of administrative remedies, where there are no disputed factual questions to be resolved and the issue is confined to the validity or application of a statute or ordinance.); *Harrison's Sanitarium, Inc. v. Com., Dept. of Health*, 417 S.W. 137, 138 (Ky. 1967).

It is widely recognized that the availability of declaratory relief under state law constitutes a "plain, speedy and efficient" remedy. *See, e.g., Folio v. City of Clarksburg*, 134 F.3d. 1211, 1215 (4th Cir. 1998); *Burris v. City of Little Rock*, 941 F.2d 717, 720-21 (8th Cir. 1991); and, *Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428, 431-32 (2nd Cir. 1989). This Court should likewise recognize the adequacy of the clubs' remedies under the Kentucky Declaratory Judgment Act.

In *Moore v. Sims*, 442 U.S. 415, 429-430 (1979), this Court held:

> Here it is abundantly clear that appellees had an opportunity to present their federal claims in the state proceedings. No more is required to

> invoke *Younger* abstention. . . . Appellees need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings . . . and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate.

Id. (internal citations and quotations omitted). In *Moore*, the appellees argued that there was no adequate remedy at state law because their "every effort, to obtain judicial relief in State court was either frustrated or denied." *Id.* Clearly, this allegation does not satisfy the third prong of *Middlesex County Ethics Commission*. The clubs should fare no better. They have a variety of remedies available in state court, and pursuant to the *Younger* abstention doctrine, they should be required to pursue those remedies.

CONCLUSION

Based upon the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

MORGAN G. RANSDELL
Kentucky Commission on Human Rights
332 West Broadway, 7th Floor
Louisville, KY 40202
(502) 595-4024

Counsel of Record for Respondents

Of Counsel:
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APPENDIX A

[SEAL]

COMMONWEALTH OF KENTUCKY

OPINION OF THE ATTORNEY GENERAL

FREDERIC J. COWAN
ATTORNEY GENERAL

STATE CAPITOL
FRANKFORT 40601

OAG 91-197
November 14, 1991

Anne Meagher Northup,
State Representative
Kentucky House of Representatives
3340 Lexington Road
Louisville, Kentucky 40206

RE: KRS 141.010(11)(d) and (13)(8)

Dear Representative Northup:

You recently wrote a letter to this office in which you asked for an opinion regarding KRS 141.010 as it pertains to deductions for amounts paid by taxpayers to any club, organization or establishment determined not to afford full and equal membership to persons because of race, color, religion, national origin or sex. KRS 141.010(11)(d) and (13)(f). You asked who has authority to make the determination that a particular club, organization or establishment is engaged in discriminatory membership practices.

KRS 141.010 specifies that this determination is to be made by the courts or by "an agency established by the Generai Assembly and charged with enforcing the civil rights laws of the Commonwealth." KRS 141.010(11)(d) and (13)(f). The agency so established and charged is the Kentucky Commission on Human Rights. KRS 344.020;

KRS 344.150. You have indicated, however, that the Commission has declined to assume responsibility on the grounds that private clubs are not places of "public accommodation, resort or amusement" as defined by KRS 344.130.

We are of the opinion that KRS 344.130 does not prevent the Commission on Human Rights from making the determination called for under KRS 141.010. Furthermore, it is our opinion that the authority granted to the Commission under Chapter 344 is broad enough to encompass the responsibility assigned to it by the General Assembly in 1990 when KRS 141.010 was amended to include sections (11)(d) and (13)(f).

KRS 344.130 exempts private clubs from compliance with KRS 344.120 which makes it an unlawful practice "to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, resort or amusement" on the basis of race, color, religion or national origin. KRS 344.120. By enacting KRS 141.010)(11)(d) and (13)(f) the General Assembly did not alter this exemption for private clubs under KRS 344.130. Rather, it expressed the separate and independent intention that no income tax deduction would be allowed for amounts paid by taxpayers to private clubs which engage in discriminatory membership practices.

It is presumed that legislatures have knowledge of existing laws and the construction placed on them by the courts. *Baker v. White*, Ky., 65 S.W.2d 1022, 1024 (1933). The narrow income tax focus of KRS 141.010 supports the

presumption that the General Assembly in amending sections (11) and (13) to include subsections (d) and (f), respectively, was well aware that private clubs are exempt from discrimination complaints under KRS 344.120. Additionally, it has long been recognized that where two statutes are not repugnant to each other, although they may deal to some extent with matters pertaining to the same subject, and each can be enforced consistently with the provisions of the other, courts will enforce the provisions of each. *Newport Benev. Burial Ass'n. v. Clay*, Ky., 186 S.W. 658, 662 (1916). Both KRS 344.130 and KRS 141.010(11)(d) and (13)(f) deal with private clubs, and both statutes involve the Commission on Human Rights. But in our view, neither statute is "repugnant to" the other, and it is our opinion that each can and should be given its independent effect.

Moreover, there is ample authority under the purposes, functions, powers and duties outlined in Chapter 344 to encompass the Commission's assigned participation in determining the allowability of deductions under KRS 141.010(11)(d) and (13)(f). The purpose of Chapter 344 is to "safeguard all individuals within the state from discrimination because of race, color, religion, national origin, sex, and age." KRS 344.020(1)(b). The Commission on Human Rights was established "to discourage discrimination against any racial or ethnic group or its members." KRS 344.150; KRS 344.170. Among its powers and duties the Commission is charged with conducting research projects or making studies into and publishing reports on discrimination, with encouraging fair treatment for all persons regardless of race or national ancestry, and with cooperating with other public and private

organizations to discourage discrimination. KRS 344.180. In enforcing the provisions of Chapter 344, the Commission is also granted the authority to "make studies appropriate to effectuate the purposes and policies of this chapter and to make the results thereof available to the public." KRS 344.190.

KRS 446.080(1) provides that "[a]ll statutes of the state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature." We believe that with regard to the deductions disallowed under KRS 141.010(11)(d) and (13)(f), the legislature intended that it should be the Kentucky Commission on Human Rights which determines whether a club, organization or establishment does not afford full and equal membership based on race, color, religion, national origin or sex. It is the opinion of this office that KRS 344.130 does not prohibit the Commission from making such determinations for this limited purpose.

/s/ Frederic J. Cowan
FREDERIC J. COWAN
ATTORNEY GENERAL

/s/ Samuel J. Floyd, Jr.
SAMUEL J. FLOYD, JR
ASSISTANT ATTORNEY GENERAL

SJF:11h

EXHIBIT A

Commonwealth of Kentucky

ANNE MEAGHER NORTHUP
HOUSE OF REPRESENTATIVES

[SEAL]

[Address Omitted In Printing]

October 9, 1991

Attorney General Fred Cowan
State Capitol
Frankfort, KY 40601

Dear General Cowan:

This is to request an Opinion of the Attorney General with regard to the discriminatory practices of private clubs and organizations. While the general case law is fairly clear that these organizations have been allowed to continue restrictive admissions practices due to the fact that their services and benefits are not available to the public, and based on the competing rights of non-association and association, the state should do nothing that contributes to the existence, stability or financial well-being of these clubs. A 1990 amendment to Kentucky's Revenue Code as it relates to deductions for amounts paid to certain organizations raises several questions.

In 1990, the General Assembly amended KRS 141.010 to alter the definition of "net income", both in the case of individuals and corporations, to disallow:

> Any deduction for amounts paid to any club, organization, or establishment which has been determined by the courts or an agency established by the General Assembly and charged

> with enforcing the civil rights laws of the Commonwealth, not to afford full and equal membership and full and equal enjoyment of its goods, services, facilities, privileges, advantages or accommodations to any person because of race, color, religion, national origin, or sex, except nothing shall be construed to deny a deduction for amounts paid to any religious or denominational club, group, or establishment or any organization operated solely for charitanble [sic] or educational puposes [sic] which restirct [sic] membershp [sic] to persons of the same religion or denomination in order to promote the religious principles for which it is established and maintained.

(KRS 141.010 (11)(d) and KRS 141.010 (13)(f)).

While the language of these provisions seem to indicate that the Human Rights Commission would be the agency which would make the determination as to whether a private club has discriminatory practices which would disallow a contributor from claiming a deduction for amounts paid thereto, the Commission has declined to assume that responsibility on the grounds that private clubs are exempt from the definition of "place of public accommodation, resort, or amusement" in KRS 344.130

Does not the bill passed in 1990 implicitly grant the Human Rights Commission the authority to make a determination of discrimination with regard to clubs? Since the 1990 statute is more recent than the statute that limits the power of the Human Rights Commission, would it not take precedence?

If the Commission on Human Rights has no jurisdiction to determine whether an organization's practices are discriminatory, what entity has that authority? Secondly, if no one currently has that authority, and therefore, amounts paid to such groups continue to be deducted, does this not amount to a state sanction of such discrimination practices in that the tax burden of individuals and corporations can be reduced by the deduction?

The facilities of private clubs are sustained, at least partially, by initiation fees, dues and expenses paid by companies and individuals that are then deducted from their income for income tax purposes. These entities are thus reducing their tax liability while they support clubs that discriminate. Surely the state has a right to ensure that it does not continue to be an "enabler" to discrimination.

I am enclosing a copy of a letter from Mr. Thomas Ebendorf, former Compliance Director and Staff Counsel of the Human Rights Commission, in which he discusses the Commission's right to make this determination. I would greatly appreciate a response as soon as possible as to the right of the Human Rights Commission to make such a determination.

Sincerely,

/s/ Anne M. Northup
Anne Meagher Northup
State Representative

AMN:kd
Enclosure

LAW OFFICES
FROCKT & KLINGMAN
[Names And Addresses Omitted In Printing]

October 9, 1991

Anne Meagher Northup, Member
Kentucky House of Representatives
3340 Lexington Road
Louisville, Kentucky 40206

Dear Rep. Northup:

I enjoyed your remarks on the issue of disallowing tax deductions for discriminatory private clubs at this morning's meeting of the Louisville Forum. I believe the bill which you introduced and passed in the last session of the General Assembly, promises to be an effective weapon against discrimination in private clubs. I share your disappointment with the announced decision of the Kentucky Commission on Human Rights not to accept and investigate complaints of discrimination against private clubs, and I believe their decision was an error. As the former Compliance Director and staff counsel of the Commission, I have spent over 20 years interpreting and enforcing discrimination laws.

My initial review of the relevant statutes does not lead me to the conclusion that the Kentucky Commission is without authority to investigate private club discrimination complaints. The Kentucky Civil Rights Act excludes a bonafide private club from its definition of a place of public accommodations (KRS 344.130). This exclusion from the definition would therefore exempt a bonafide private club from the prohibitions against discrimination set forth in KRS 344.120.

However, the Commission's power to investigate and make determinations is not derived from either of those coverage sections (KRS 344.130 or 120). The Commission's powers and duties are set forth in KRS 344.180 and 190. The pertinent provisions empowering the Commission to investigate, are located at Section 180(3), Section 190(8), and Section 190(10). The question as I would pose it to the Attorney General would be: "Are the provisions of KRS 344.180 and 190 sufficient to empower the Commission to conduct investigations, make determinations whether a club, organization or establishment, discriminates in its membership policies or practices and report its findings to the Kentucky Revenue Cabinet for appropriate action?" It is the Kentucky Revenue Cabinet's duty to apply the limitations on income tax deduction set forth in KRS 141.010. The Kentucky Commission on Human Rights' role is limited to supplying its determination after an investigation performed under the authority of KRS 344.180 and 190. The question of the Commission's authority to investigate and make determinations is the issue, not the [sic] whether a private club is prohibited from discriminating under the provisions of the Kentucky Civil Rights Act.

I understand that you have initiated a request for an opinion from the Attorney General's office on this issue. I would appreciate receiving a copy of your letter

requesting an opinion and would be happy to consult with you concerning any future efforts to deal with this issue.

Very truly yours,

FROCKT & KLINGMAN

/s/ Thomas A. Ebendorf
Thomas A. Ebendorf
Attorney at Law

TAE/clj

APPENDIX B

COMMONWEALTH OF KENTUCKY
KENTUCKY COMMISSION ON HUMAN RIGHTS
KCHR COMPLAINT NOS. 256-PA, 257-PA, 258-PA

KENTUCKY COMMISSION ON HUMAN RIGHTS

COMPLAINANT

v. **NOTICE OF WITHDRAWAL OF PENDING DISCOVERY DEMANDS AND COMPLAINANT'S INTERROGATORIES SEEKING STATISTICAL INFORMATION REGARDING CLUB MEMBERSHIP**

LOUISVILLE COUNTRY CLUB,
IDLE HOUR COUNTRY CLUB, and
PENDENNIS CLUB INCORPORATED

RESPONDENTS

* * * * * * * * * * *

The Respondents shall take notice that the Kentucky Commission on Human Rights hereby withdraws its pending discovery requests which seek: (1) the production of documents containing "Any and all MEMBERSHIP LISTS WITH NAME AND DATES DESIGNATED THEREON;" and (2) the names of club members, membership applicants, employees, officers, or individuals denied membership. The Kentucky Commission on Human Rights expressly reserves the right to seek such lists or information in the future, should such discovery be determined necessary to an adjudication of the present action.

In lieu of the withdrawn discovery demands, the Commission submits the following interrogatories to each of the Respondents.

INTERROGATORIES

1. Identify the total number of current members of your club?

   RESPONSE:

2. Identify the total number of current members of your club who are black.

   RESPONSE:

3. Identify the total number of current members of your club who are american indian, eskimo, or aleut.

   RESPONSE:

4. Identify the total number of current members of your club who are hispanic.

   RESPONSE:

5. Identify the total number of current members of your club who are asian.

   RESPONSE:

6. Identify the total number of current members of your club who are white.

   RESPONSE:

7. Identify the total number of current members of your club who are of a race other than those listed above in interrogatories two through six.

   RESPONSE:

8. Identify the total number of current members of your club who are female?

RESPONSE:

Respectfully submitted,

KENTUCKY COMMISSION ON HUMAN RIGHTS

/s/ Morgan Ransdell
Morgan G. Ransdell, Esq.
Leslie A. Jones, Esq.
The Heyburn Bldg., Seventh Floor
332 West Broadway
Louisville, KY 40202
(502) 595-4024

CERTIFICATE OF SERVICE

I certify that the original copy of the foregoing has been served for filing, by hand-delivery, this 30th day of August, 1999, upon: Kentucky Commission on Human Rights, The Heyburn Building, 7th Floor, 332 West Broadway, Louisville, Kentucky 40202. I further certify that, on the same date, a true copy of the foregoing was mailed to: Mr. John O. Sheller, SMITH & SMITH ATTORNEYS, 400 North First Trust Centre, 200 South Fifth Street, Louisville, KY 40202, Counsel for Louisville Country Club; Mr. Richard G. Griffith, STITES & HARBISON, 2300 Lexington Financial Center, 250 West Main Street, Lexington, KY 40507-1758, Counsel for Idle Hour Country Club; Mr. D. Patton Pelfrey, BROWN, TODD & HEYBURN, 3200 Providian Center, Louisville, KY 40202-3363, Counsel for Pendennis Club Incorporated.

/s/ Morgan Ransdell
Morgan G. Ransdell,
Staff Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT
CIVIL ACTION NO. 95-48

LOUISVILLE COUNTRY CLUB, ET AL.

PLAINTIFFS

v. REPORT OF PARTIES' PLANNING MEETING

(Filed May 31, 1996)

KENTUCKY COMMISSION ON HUMAN RIGHTS, ET AL.

DEFENDANTS

* * * * * * * * *

Pursuant to the Court's Order of April 29, 1996, the parties hereby submit their joint report under Rule 26(f) as follows:

1. Pursuant to Fed. R. Civ. P. 26(f), the following counsel for the parties conferred on or before May 21, 1996, to develop this joint report:

a. For the plaintiffs:

Richard G. Griffith, Esq. – Idle Hour Country club

John O. Sheller, Esq. – Louisville Country Club

D. Patton Pelfrey, Esq.[1] Pendennis Club

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[1] Mr. Pelfrey was not available to participate, but was represented by John O. Sheller, Esq.

b. For the defendants:

D. Brent Irvin, Esq.

Morgan G. Ransdell, Esq.

2. Initial Disclosures under Rule 26(a)(1)

a. Plaintiffs: Plaintiffs have disclosed to defendants in administrative proceedings which preceded this lawsuit (and in attachments to their verified Complaints) all documents which they contend fall within the scope of initial disclosures under Fed. R. Civ. P. 26(a)(1)(B). Fed. R. Civ. P. 26(a)(1)(C), (D) are inapplicable to plaintiffs. Plaintiffs contend that they cannot make additional disclosures which may be required by Fed. R. Civ. P. 26(a)(1)(A) and (B) without defeating the very purpose of this action – to preserve the constitutional privacy and associational rights of their members. Defendants disagree and anticipate a dispute regarding the privilege which plaintiffs claim, and the scope of relevant discovery.

b. Defendants: To date, Plaintiffs have received, in administrative proceedings which preceded this lawsuit, certain documents within the scope of initial disclosures under Fed. R. Civ. P. 26(a)(1)(B). Defendants have made no disclosures pursuant to Fed. R. Civ. P. 26(a)(1)(A) and (B). Fed. R. Civ. P. 26(a)(1)(C), (D) are inapplicable to defendants. Defendants contend that certain documents in their custody are protected from discovery by attorney/client and/or work product privilege. Plaintiffs disagree. In light of the joint motion to stay discovery, Defendants contend that they should be exempt from making additional disclosures during the requested stay of discovery. Plaintiffs disagree; nevertheless, Plaintiffs agree not to take any action regarding Fed. R. Civ. P.

26(a)(1) disclosures if and while the requested stay is in place.

3. Discovery Plan

The parties request all discovery be stayed pending resolution of initial dispositive motions. The parties state that the initial dispositive motions in this action will not necessitate discovery. Because it is anticipated that discovery will result in collateral litigation, the parties request that the Court stay all discovery until resolution of initial dispositive motions. The parties agree to file initial dispositive motions on or before August 15, 1996. After such motions are disposed of by the Court, the parties request that discovery be resumed.

If and when it becomes necessary to conduct discovery, the parties agree that they will confer (in person or by teleconference) in advance of the service of any written discovery requests, deposition notices and subpoenas to explore appropriate limitations on the methods, nature, scope and timing of discovery. The parties agree that, among other possible limitations, they will consider the limitations described in Fed. R. Civ. P. 26(c).

4. Other Items

a. The parties do not request a conference with the Court and do not believe that the entry of a scheduling order is necessary in this action at this time.

b. The parties do not request a pretrial conference and do not believe that one should be set at this time.

c. The parties agree that, other than as prescribed by Fed. R. Civ. P. 25(d)(1), no additional parties should be joined in this action.

d. The parties agree to file the above mentioned initial dispositive motions on or before August 15, 1996. After such motions are disposed of by the Court, the parties request that discovery be resumed and a status conference be convened to determine any future scheduling.

e. Settlement is highly unlikely. The parties have discussed settlement on numerous occasions in a rational, cooperative and cordial manner. They do not believe that any form of alternative dispute resolution procedure would facilitate settlement.

f. The exchange of final lists of witness and exhibits should be deferred pending the entry of a scheduling order at a later date.

g. The parties cannot now anticipate when this case would be ready for trial. Once ready, the parties believe the trial would take about five days. Because no party has demanded trial by jury, the trial would be a bench trial.

h. There is no mutual consent to refer this case to a United States Magistrate Judge.

Respectfully submitted,

A.B. CHANDLER III
ATTORNEY GENERAL
/s/ D. Brent Irvin
D. Brent Irvin
Morgan G. Ransdell
Assistant Attorneys General
P. O. Box 2000
Frankfort, KY 40602-2000
Counsel for Defendants

KENTUCKY COMMISSION ON HUMAN RIGHTS
/s/ Leslie A. Jones
Leslie A. Jones by DBI
Laura H. Early
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Louisville, KY 40202
Counsel for Defendants

STITES & HARBISON
/s/ Richard G. Griffith

Richard G. Griffith
2300 Lexington
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Lexington, KY 40507-1758
Counsel for Idle Hour
Country Club

SMITH & SMITH
ATTORNEYS
/s/ John O. Sheller
James U. Smith III
John O. Sheller by DBI
400 North First
Trust Centre
200 South Fifth Street
Louisville, KY 40202
Counsel for Louisville
Country Club

BROWN, TODD
& HEYBURN
/s/ D. Patton Pelfrey
D. Patton Pelfrey by DBI
James D. Cockrum
3200 Providian Center
Louisville, KY 40202-3363
Counsel for Pendennis
Club

APPENDIX D

COMMONWEALTH OF KENTUCKY
KENTUCKY COMMISSION ON HUMAN RIGHTS
KCHR COMPLAINT NOS. 256-PA, 257-PA, 258-PA

KENTUCKY COMMISSION ON HUMAN RIGHTS [SIC]

COMPLAINANT

v.

RESPONDENTS' OBJECTION TO AND MOTION FOR ENLARGEMENT OF TIME TO RESPOND FURTHER TO "NOTICE OF WITHDRAWAL OF PENDING DISCOVERY DEMANDS AND COMPLAINANT'S INTERROGATORIES SEEKING STATISTICAL INFORMATION REGARDING CLUB MEMBERSHIP"

LOUISVILLE COUNTRY CLUB,
IDLE HOUR COUNTRY CLUB, and
PENDENNIS CLUB INCORPORATED

RESPONDENTS

(Filed Oct. 5, 1999)

* * * * * * *

Respondents object to the "Notice of Withdrawal of Pending Discovery Demands and Complainant's Interrogatories Seeking Statistical Information Regarding Club Membership" on the following grounds:

1. The Complainant in the referenced cases is Mae Cleveland, not the KCHR.

2. The KCHR has no personal or subject matter jurisdiction in this case.

3. The Respondents object on all grounds set forth in the pleadings, motions, briefs, and other papers previously filed in this proceeding, in the Coleman proceeding, in the federal district court proceeding, and in all related appellate proceedings.

4. The Respondents object because neither the KCHR's enabling statute or regulations nor the Kentucky Rules of Civil Procedure permit unilateral withdrawal of previous discovery requests, particularly where such requests are not withdrawn with prejudice to their resubmission.

5. The discovery requests violate the Respondents' rights under the First and Fourteenth Amendments to the United States Constitution, including but not limited to, their rights of free association, privacy, equal protection, substantive due process, and procedural due process.

6. The discovery requests violate the KCHR's own prior orders in this case or the Coleman case holding that (a) the KCHR does not have jurisdiction and (b) the KCHR should first conduct an investigation of its own jurisdiction, rather than on the issue of discrimination.

7. The discovery requests violate the KCHR's agreement to refrain from proceeding with administrative activities in this case pending the federal litigation.

8. The discovery requests are barred by laches.

9. The discovery requests are barred by the doctrines of waiver, estoppel, and unclean hands.

10. The discovery requests are barred by the law of the case doctrine.

11. The discovery requests are invalid and ineffectual under the provisions of KRS 344.200(2), KRS 344.200(6), and KRS 344.210(1).

12. Respondents expressly reserve any and all other objections they may have to the discovery requests and, without in any way waiving their position that the KCHR has no jurisdiction in this matter, Respondents move for an enlargement of the response time to and including December 31, 1999, in order to submit further objections, responses, or motions in connection with the discovery requests.

13. In support of their motion for enlargement, Respondents submit that it is their understanding, based upon communications with counsel for the parties, that no enforcement is contemplated regarding the discovery requests during calendar year 1999. An extension for Respondents to respond further on or before December 31, 1999, is consistent with this understanding.

WHEREFORE, Respondents pray that their objections be entered in the record and that their motion be granted.

Respectfully submitted,

SMITH and SMITH, ATTORNEYS
/s/ John O. Sheller
John O. Sheller
400 North, First Trust Centre
200 South Fifth Street
Louisville, Kentucky 40202
(502) 587-0761
Counsel for Respondent
Louisville County Club

STITES & HARBISON

/s/ Richard G. Griffith
Richard G. Griffith
2300 Lexington Financial Center
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(606) 226-2300
Counsel for Respondent
Idle Hour Country Club

BROWN, TODD
& HEYBURN, PLLC

/s/ D. Patton Pelfrey
D. Patton Pelfrey
Robert W. Dibert
3200 Aegon Center
400 West Market Street
Louisville, Kentucky 40202
(502) 589-5400
Counsel for Respondent
The Pendennis Club, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RESPONDENTS' OBJECTION TO AND MOTION FOR ENLARGEMENT OF TIME TO RESPOND FURTHER TO "NOTICE OF WITHDRAWAL OF PENDING DISCOVERY DEMANDS AND COMPLAINANT'S INTERROGATORIES SEEKING STATISTICAL INFORMATION REGARDING CLUB MEMBERSHIP" was

served this 4th day of October, 1999, by United States mail, postage prepaid, upon:

KENTUCKY COMMISSION ON HUMAN RIGHTS
Leslie A. Jones, Esq.
Morgan G. Ransdell, Esq.
The Heyburn Building - 7th Floor
332 West Broadway
Louisville, Kentucky 40202

/s/ Illegible
Counsel for Respondents